



STATE OF INDIANA

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October 30, 2009

Mr. John Emry, for Mr. Floyd Cooper
62 W. Jefferson Street
Franklin, IN 46131

*Re: Formal Complaint 09-FC-221; Alleged Violation of the Access to
Public Records Act by the Wayne County Sheriff*

Dear Mr. Emry:

This advisory opinion is in response to your formal complaint alleging that the Wayne County Sheriff (the "Sheriff") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying your client, Mr. Floyd Cooper, access to public records. For the following reasons, it is my opinion that the Sheriff violated the APRA.

BACKGROUND

In your complaint, you allege that on September 8, 2009, you made a written request for "a copy of medical records and inmate file" for your client, Mr. Cooper. Along with the written request, you enclosed an "Authorization to Release Medical Records" (the "Medical Release") executed by Mr. Cooper and dated September 8, 2009. You requested that the Sheriff forward you a copy of such records and agreed to pay for actual copy costs. As of September 30, 2009, when you filed your complaint with this office, you had not received a response from the Sheriff.

My office forwarded a copy of your complaint to the Sheriff. Sheriff Matt Strittmatter's response on behalf of the Sheriff is enclosed for your review. In it, Mr. Strittmatter notes that you have filed a "Notice of Tort Claim" and are attempting to obtain records for use in that claim. Mr. Strittmatter claims that your request is not valid because "the records [you are] requesting are medical records, which are not considered public record." Mr. Strittmatter further responds by stating that his understanding is that the Sheriff is not required to produce copies of records to you via electronic mail, facsimile, or mail because the APRA only requires that public records be made available for inspection.

ANALYSIS

The public policy of the APRA states, “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” I.C. § 5-14-3-1. The Sheriff is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the Sheriff during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. I.C. §5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. When the request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(c).

Here, the Sheriff neither responded to your request in writing within seven (7) days nor cited to the specific statutory authority that would permit it to withhold the requested records. The Sheriff’s response to this office is likewise lacking in specific statutory citations that would authorize nondisclosure of the records. Previous public access counselors have opined that general citations to “HIPAA” or the perceived privacy of medical records is not sufficient; public agencies should cite to the *specific* HIPAA provision that applies to bar a record’s release. *See Opinion of the Public Access Counselor 08-FC-169*. Moreover, from the information before me, it appears that the Medical Release sent to the Sheriff would permit the Sheriff to release the requested records notwithstanding HIPAA’s privacy rules. “HIPAA authorizes a health care provider to disclose protected medical records when the subject of those records has authorized their release.” *See Garnish v. M/V Eyak LLC*, 2008 U.S. Dist. LEXIS 42662 at *8-9 (D. Alaska May 29, 2008). “The corresponding regulations state that ‘a covered entity is permitted to . . . disclose protected health information . . . pursuant to and in compliance with a valid authorization under § 164.508[.]’” *Id.* Thus, in my opinion, the Sheriff has not shown that it can sustain its burden of proof under the APRA that HIPAA bars the release of the records requested here.

The Sheriff further contends that it is not required to send you copies of records at its expense. While this is generally true, this office has stated that it is reasonable for public agencies to send copies of records to the requester via the mail where the requester has paid for the applicable postage costs. *See Opinion of the Public Access Counselor 09-FC-13*. The APRA provides that an agency must provide copies of records if the agency has reasonable access to a machine capable of reproducing the records if the person is entitled to a copy of the record. *See* I.C. § 5-14-3-8(e). The agency may charge

a copy fee that conforms to I.C. § 5-14-3-8 and may charge the fee in advance of providing the copies. *See* I.C. § 5-14-3-8(e). The APRA is silent on the issue of postage costs, so this office generally advises that the agency may charge the actual cost of postage in addition to the approved copy costs. In my opinion, it would be appropriate for the Sheriff to respond to the request within the timeframe set out in I.C. § 5-14-3-9 and in that response indicate the copy and postage costs. Upon receipt of that fee (or upon receipt of the copy fee and an envelope with postage pre-paid by you), the Sheriff should then send the copies. *See Opinion of the Public Access Counselor 09-FC-13.*

CONCLUSION

For the foregoing reasons, it is my opinion that the Sheriff violated the APRA by failing to respond to your request with a citation to the specific statutory authority upon which the Sheriff based its denial of your request. Further, it is my opinion that the Sheriff has not shown that it meet its burden of proof to sustain the denial of your request.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

Cc: Sheriff Matt Strittmatter, Wayne County Sheriff's Office (*via facsimile*)